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No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

MAY TERM, 1982

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ROBERT C. GILLIARD, JR.,

Petitioner,

v.

STATE OF MISSISSIPPI

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

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DAVID M. CORWIN
140 Henry Street
Brooklyn, New York 11201
(212) 852-1893

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Where the circumstance that the murder was committed in the course of robbery and the circumstance that the murder was committed for pecuniary gain are both submitted as aggravating factors instructions to a penalty phase jury, do these instructions form a constitutionally infirm two-part series of defective cumulative and duplicate instructions?

2. Can the heinous, atrocious, and cruel aggravating factor be properly submitted to a jury where the victim dies instantaneously of a single shotgun blast without prior battery or physical torture of any kind?

3. Where the state supreme court below decided summarily without discussion that no issue was presented by questions (1) and (2), is the Stephens v. Zant problem of invalid death sentence based on

one or more defective aggravating factor instructions automatically raised?

4. Can the problem of the prosecutor's use of peremptory challenges to obtain an all-white jury and exclude all otherwise eligible black veniremen be dismissed without a hearing to see if this is a pattern of practice in the trial jurisdiction concerned?

5. Should the defense attorney have been allowed at trial to develop further material on "agency" domination of the defendant's will overborne by one who supplied the sawed-off shotgun murder weapon and drove the car used in commission of the crime and to proceed to an offer of proof and/or a hearing for the purpose of obtaining a jury instruction on an "agency" defense?

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Petitioner, Robert C. Gilliard, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Mississippi, Gilliard v. State, 428 So.2d

576 (Miss. 1983) is annexed hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on February 16, 1983. The time for filing the petition was extended to and including May 17, 1983, upon motion by petitioner. Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner signed a statement admitting he shot Grady Chance with a single

shotgun blast during a store robbery (Tr. 601). He later testified that the statement had been elicited by the threatening behavior of state investigator Harold Marks who said he put word out on the crime to the [Klu Klux] Klan on the street and who "clicked" [pulled the trigger] of an empty gun pointed at defendant to show what would happen to him (Tr. 108). Gilliard testified that he had been surprised by the victim's rising from a chair at the end of the robbery and, half-turning, had dropped the shotgun butt on a solid object causing it to fire without his intention. (Tr. 512, 545, 601). Wilma Chance, the victim's widow and a robbery witness, asserted that the weapon was fired while her husband was seated (Tr. 529).

Mrs. Chance failed to identify defendant Gilliard in a lineup in which she did identify the other perpetrator in the

store, one Darby (Tr. 26-27). Subsequently Gilliard was presented with Darby and no others to Mrs. Chance, who was asked which one pulled the trigger; she replied, "I am not sure, and could be wrong, I just don't know," after making the hyper-suggested identification of Gilliard as the triggerman (ibid.).

The local sheriff testified on motion for change of venue hearing that he had heard rumors of threats against Giliard indirectly (Tr. 15).

It was further established that Giliard's prior arrest for robbery was with Warren Seels, the driver and provider of the sawed-off shotgun murder weapon in the instant crime (Tr. 52-53). Seels' statement implicating Gilliard was read to the latter three times before he chose to make a self-incriminating statement in the instant case (Tr. 57).

Mrs. Chance's initial descriptions of the perpetrators prior to the lineup and hyper-suggestive showing initially led the police to look for two entirely different persons from the ones finally apprehended for the crime according to police officer Little on cross-examination (Tr. 149).

The court excused a juror who said she did not have the stomach for passing judgment but who had no abstract opposition to the death penalty defense attorney Parrish objected unsuccessfully (Tr. 374).

All the jurors peremptorily excused by the state were black, and they were the only blacks eligible in the venire for the eventual panel (Tr. 401, see also 738).

The defendant testified that he had been enlisted for the crime by its mastermind, Warren Seels, while he, Gilliard, had

been drinking (Tr. 518). The district attorney introduced testimony by Seels that Gilliard had initiated inquiry as to whether Seels had the shotgun murder weapon with him on the day of the crime (Tr. 539) and that Gilliard had directed Seels to the crime scene (Tr. 540-541). However, the defense established that Seels was the one who originally cut down the barrel and butt of the gun and asked Seels whether he was in the habit of riding around in his car with the perpetual presence and possession of a sawed-off shotgun merely for purposes of self-defense (Tr. 559-560). Further inquiry of Seels was cut off by the state's objections sustained by the trial court.

Finally, Gilliard testified that Seals asked him after the murder why he left Mrs. Chance alive (Tr. 545).

Two of the aggravating factors instructed to the jury in the penalty phase trial were that the murder had been committed while engaged in the crime of robbery and that the defendant had committed the crime for pecuniary gain (Tr. 695). Two other aggravating factors were submitted: that the defendant had been previously convicted of a violent felony offense (Tr. 708), and that the crime was committed in a heinous, atrocious, and cruel fashion, despite the fact that the victim had been killed instantaneously without a preceding battery.

District Attorney Walters in his summation stated, "I submit to you that it is time for a jury as yourselves to get rid of people like Gilliard --" as defense attorney Parrish objected (Tr. 708).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Supreme Court of Mississippi cited Smith v. State, 419 So.2d 563, (Sup. Ct. Miss. 1982), without discussion to indicate that the robbery-pecuniary gain duplicate cumulation in jury instructions was not defective. Again without discussion and with mere mention of Godfrey v. Georgia, 446 U.S. 420 (1980), and asserted "decisions of the Florida Supreme Court," the Mississippi Supreme Court asserted baldly that the heinous, atrocious and cruel aggravating factor had been properly submitted to the jury.

The problem evinced in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (1981), cert. granted 454 U.S. 814 (1981), as to defective aggravating factors invalidating a death sentence was not raised below, but is necessarily implicated by the paucity of

the Mississippi Supreme Court's reasoning in discussion of aggravating factor discussion.

Attorney Parrish moved at trial to quash the jury panel of exclusion of blacks by the prosecutor's peremptory challenges. Without any reasoned discussion, the Mississippi Supreme Court summarily cited Gaines v. State, 404 So.2d 557 (Miss. 1981) and Swain v. Alabama, 380 U.S. 202, to reject appellant's argument regarding exclusion of blacks from Gilliard's trial jury.

At the trial, defense attorney Parrish attempted to elucidate material on Warren Seals "agency" domination of the will of defendant Robert C. Gulliard, but he was not allowed to proceed to a full hearing stage.

Reasons for Granting the Writ

Grady Chance was killed instantaneously by a double-barreled shotgun blast; he was not subjected to an assault of any kind, much less an aggravated assault prior to the killings nor was he the victim of any physical torture. Thus, according to the standards established by Godfrey v. Georgia, 446 U.S. 420 (1980), the submission by the trial court of the heinous, atrocious and cruel aggravating factor was constitutionally defective, much less the positive finding by the jury.

Further the aggravating factors of commission of the crime while engaged in the crime of robbery or operation and commission of the killing for pecuniary gain are falsely and defectively cumulative, since both factors arise out of an identical circumstance, robbery coupled

with murder. In Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), presently sub judice in this court, a death sentence was vacated where one aggravating factor under consideration by the jury was subsequently declared unconstitutional by the Georgia Supreme Court. Where the jury's deliberations were tainted by consideration of a double false cumulation of factors and a factor deficient by application of law to the facts, a fortiori, application of the Stephens v. Zant holding should be made. The jury's deliberations were not adequately channeled by constitutionally firm and valid instructions on aggravating factors to allow a verdict that will pass muster under federal review.

Where prima facie discrimination on grounds of race is shown to have occurred in jury selection, use of the same selec-

tion method in a second trial or recruitment of jurors through personal acquaintanceship with the jury commissioners will not be allowed to stand, Whitus v. State of Georgia, 385 U.S. 545 (1967). Once the prima facie finding of jury selection discrimination has been made, the burden shifts to the state to explain the disparity, Newman v. Henderson, 539 F.2d 502 (5th Cir. 1976), cert. denied, Maggio v. Newman, 433 U.S. 914 (1977). At the basis of the findings in Whitus and Newman is the standard set forth in Gibson v. Blair, 467 F.2d 842 (5th Cir. 1972) that

> A state court conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which black jurors were excluded because of their race. 467 F.2d 842 at 844.

See also U.S. v. Turcotte, 558 F.2d 893 (8th Cir. 1977), Braxton v. Estelle, 641 F.2d 392 (5th Cir. 1981) and Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982),

which, while not guaranteeing a mirror image microcosm of the community from which the jury is drawn to protect against purposeful exclusion of any recognizable sociological group from the array and final panel.

These cases follow in the wake of Swain v. Alabama, 380 U.S. 202 (1965) which determined that while a black defendant was not entitled to a jury containing members of his race, purposeful or deliberate exclusion of blacks on juries was prohibited constitutionally.

Where, as in the case at bar, the prosecution used peremptory challenges against all black jurors, the defendant is entitled to a hearing to determine whether the propensity to exclude and actual exclusion of blacks is a widespread practice in the trial jurisdiction, ordinary standards for civil rights pattern or

practice to prevail. Specifically, defendant is entitled to a hearing to see whether the opportunity to discriminate was capitalized upon by the state, Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971) see also Singleton v. Estelle, 492 F.2d 671 (5th Cir. 1974). Here the defense sought to pursue the jury exclusion issue further before the trial court, but the judge, far from allowing a hearing to determine whether a pattern of exclusion existed in other criminal trials, foreclosed the inquiry entirely.

Contradictory evidence was entered as to whether Warren Seals III, owner and provider of the formidable shotgun murder weapon and driver of the crime car, masterminded the operation or whether instant defendant enlisted him at a party the night before the robbery. While Seals waited outside the Chance's store on the

morning of the crime his possession of a weapon useful only in violence against persons in more or less close quarters suggests that he may have established the framework and setup for the crime and recruited the unhappy veteran defendant, who had not made a successful readjustment to civilian life.

An offer of proof and/or hearing should have been allowed on the question of domination of Gilliard's will by Seal's personality (with the goal of obtaining an "agency" jury instruction in mind) as was sought to be established by the defense at trial. It has been held in the religious cult framework, that a person's will can be dominated by another (or others) to the extent of causing involuntary servitude, Turner v. Unification Church, 473 F.Supp. 367 (DRI, 1978). Psychological debilitation of members is a recognized element of

the cult setting according to authoritative observers, Church of Scientology of California v. Sigelman, 475 F.Supp. 950 (S.D. N.Y. 1979). Under influence, overpowering the will without convincing the judgment, has long been a category in the law of estates, In re Halbert's Will, 15 Misc. 308 (Surrogate Court, Oneida County, 1895), and a testator may be unduly influenced to act against his own will from fear, the desire of peace, or some other feeling which he is unable to resist, Long v. Long, 125 S.W.2d 1034, 1035, 133 Tex. 96 (Sup. Ct. Tex., 1939).

Thus it has long been established that the courts will consider the question of psychological domination, semi-colloquially "agency" in the criminal setting, and attorney Parrish's attempt to secure further testimony from a perpetrator on the subject below at trial should have been

allowed to proceed in addition, the defense should have been allowed an offer or proof or full-fledged hearing on development of the "agency" defense.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

DAVID M. CORWIN
140 Henry Street
Brooklyn, New York 11201

Attorney for Petitioner

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Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Robert C. Gilliard, Jr., by his undersigned counsel asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Mississippi without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at Mississippi State Penitentiary, Parchman, Mississippi. Mr. Gilliard's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

David M. Corwin
140 Henry Street
Brooklyn, N.Y. 11201

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v.

STATE OF MISSISSIPPI,

Respondent.

STATE OF NEW YORK)
): ss:
COUNTY OF NEW YORK)

AFFIDAVIT

DAVID M. CORWIN, being duly sworn, states:

1. I am an attorney for Robert C. Gilliard, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Gilliard's motion for leave to proceed in forma pauperis. My representation of Mr. Gilliard is without remuneration.

2. Mr. Gilliard is presently in the custody of the State of Mississippi and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Gilliard by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Gilliard is attached hereto.

3. Counsel was appointed to represent Mr. Gilliard at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Gilliard is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Gilliard is entitled to redress in this action.

DAVID M. CORWIN

Sworn to before me this
17th day of May, 1983

Notary Public

Judith C. Reed
Notary Public, State of New York
No. 60-4640840
Qualified in Westchester County
Commission Expires March 30, 19...

APPENDIX A

Robert C. GILLIARD, Jr.

v.

STATE of Mississippi.

No. 53959.

Supreme Court of Mississippi.

Feb. 16, 1983.

Defendant was convicted in the Circuit Court, Jones County, James D. Hester, J., of capital murder, was sentenced to death, and he appealed. The Supreme Court, Roy Noble Lee, J., held that: (1) trial court did not abuse its discretion in denying motion for a change of venue; (2) trial court did not err in failing to quash jury panel; (3) evidence was properly admitted at sentencing phase; (4) failure to inform jury of deal in plea negotiations between the State and defendant's accomplice was not reversible error; (5) erroneous statement by district attorney in closing argument did not require reversal; (6) trial court did not err in refusing defendant's jury instructions; and (7) death sentence was properly imposed.

Affirmed.

1. Criminal Law ⇐134(2)

Defendant's motion for a change of venue was invalid since the motion was not supported by affidavits of two or more credible persons as required by statute. Code 1972, § 99-15-35.

2. Criminal Law ⇐126(2)

Trial judge, who heard evidence on motion for a change of venue from seven witnesses, none of whom testified that defendant could not receive a fair trial on capital murder charge in county of venue, and who reserved final decision until after voir dire examination of jurors to determine from that examination whether a fair and unbiased jury could be obtained, did not abuse his discretion in denying change of venue.

3. Jury ⇐116

Trial court did not err in failing to quash jury panel because of State's use of its peremptory challenges to exclude all persons of the Negro race solely on basis of race.

4. Jury ⇐110(14)

Trial court would not be put in error because of failure to permit challenge of certain jurors for cause where defendant still had peremptory challenges which were not used.

5. Jury ⇐90

In murder prosecution, trial court did not abuse its discretion in refusing to excuse for cause jurors who indicated they were acquainted to some extent with victim.

6. Jury ⇐90

Trial court did not err in excluding juror whose wife was defendant's second cousin. Code 1972, § 13-5-79.

7. Criminal Law ⇐986.6(3)

Photographs showing certain physical evidence in robbed store, including victim's body, were admissible in sentencing phase of capital murder case. Code 1972, § 99-19-101.

8. Criminal Law ⇐986.6(3)

Shotgun used in robbery, scale drawing of crime scene, spent shotgun shell, wadding, vial containing shotgun pellets, and photographs of street and exterior of store taken from point where get-away car was parked were admissible in sentencing phase of capital murder case, as was testimony of witnesses who identified items of physical evidence. Code 1972, § 99-19-101.

9. Criminal Law ⇐1177
Witnesses ⇐380(2)

In sentencing phase of capital murder case, cross-examination of defendant concerning his guilty plea in an attempt to refute defendant's claim that the homicide was not intentional was not improper impeachment and did not constitute reversible error since it had relevance on issue of whether or not the homicide was especially heinous, atrocious or cruel.

10. Criminal Law ⇐1173.2(6)

Trial court's failure to inform jury of deal in plea negotiations between the State and defendant's accomplice, who testified against defendant, was not reversible error.

11. Criminal Law ⇐726, 1171.7

Prosecutor erred in commenting, at sentencing phase of capital murder case, that imposing a life sentence would only be ten years, at which time defendant would be eligible for parole, but the error did not require reversal since the comment was provoked by defense counsel's implication that defendant, if not sentenced to death, would spend remainder of his life in state penitentiary.

12. Criminal Law ⇐829(22)

In light of instructions given at sentencing phase of capital murder case, trial court's refusal to give instructions requested by defendant was not error.

13. Criminal Law ⇐796

Trial court is not required to specifically point out and emphasize all possible mitigating circumstances in sentencing phase; it is sufficient if court by instruction informs jury it can consider any mitigating circumstance and then leaves for jury determination of what may, or may not, be mitigating.

14. Homicide ⇐311

In sentencing phase of capital murder case, trial court did not err in instructing on both aggravating factors that capital murder was committed while defendant was engaged in commission of crime of robbery and that defendant committed capital murder for pecuniary gain.

15. Homicide ⇐311

Question of whether or not murder was especially atrocious, heinous, or cruel was properly submitted to jury at sentencing phase of capital murder trial arising from shotgun death of store proprietor during armed robbery.

16. Homicide ⇐354

Death sentence imposed in capital murder case was not too great when aggravating and mitigating circumstances were weighed against each other. Code 1972, § 99-19-101.

17. Homicide ⇐354

Death sentence in capital murder case was not imposed under influence of passion, prejudice or any other arbitrary factor, and evidence overwhelmingly supported jury's finding of at least one statutory aggravating circumstance. Code.1972, § 99-19-101.

J. Ronald Parrish, Laurel, for appellant.

Bill Allain, Atty. Gen. by Charles W. Maris, Jr., Sp. Asst. Atty. Gen., Jackson, for appellee.

En Banc.

ROY NOBLE LEE, Justice, for the Court:

Robert C. Gilliard, Jr. and Edwin Darby were jointly indicted in the Circuit Court of Jones County, for capital murder. A severance was granted, Gilliard entered a plea of guilty to the charge, and the trial proceeded on the sentencing phase, Honorable James D. Hester, presiding. After hearing the evidence, receiving the instructions from the court, and argument of counsel, the jury found Gilliard guilty and sentenced him to death. He has appealed and assigns eleven (11) errors in the trial below.

FACTS

The evidence for the State shows that on August 27, 1981, Gilliard, age thirty-seven (37) years, lived with one Tressie Jones in Heidelberg, Mississippi. On that date, they attended a party and met Warren Seals and Edwin Darby. They were drinking intoxicating liquor and the group decided to rob some business in Laurel. They drove to two establishments there, but several customers were in each place and they passed them up. Eventually, they drove to the Best Chance Package Store on Ellisville Boulevard, where Gilliard and Darby got out of the car, leaving Seals and Tressie Jones inside.

Gilliard was armed with a .25-caliber automatic pistol and Darby had a sawed-off shotgun. Gilliard exchanged the .25-automatic to Darby for the shotgun before leaving the automobile. They entered the store and saw the proprietor, Grady Chance, sitting in a chair facing the entrance to the store. Mrs. Wilma Chance, his wife, was sitting on a stool behind the counter and was talking on the telephone. Darby grabbed the telephone from her hand and jerked it off the wall. The robbers then ordered Mrs. Chance to open the cash register and give them the money, which she did. Mr. Chance told them, "We don't have much money here. We went to the bank." He remained sitting in the chair and Gilliard went behind the counter in search of more money. They took approximately two hundred dollars ($200.00) from the store.

Gilliard ordered the Chances to give him the keys to their automobile, planning to take the same and drive it to a different place where Seals would pick them up. Mrs. Chance testified that her husband was still sitting in the chair and was only about two feet away from Gilliard when he shot Mr. Chance in the chest, the load causing him to spin and fall to the floor. Gilliard and Darby then left and went around the back of the store. Seals started the car, left the scene and was unable to find them. Mrs. Chance went to a nearby restaurant for help, where a nurse had heard the noise and went to the store. She found Mr. Chance lying in a pool of blood with no pulse or breathing. She attempted to resuscitate him without success. Detective Jonathan Hare of the Laurel Police Department received a call about the robbery around 8:15 p.m. and immediately went to the scene (other officers had already arrived). He photographed the body and the store and collected items of physical evidence, consisting of a spent shotgun shell and wadding.

Gilliard admitted the robbery and the shooting, but claimed that he was pointing the shotgun at Mr. Chance and did not intend to shoot him; that Mr. Chance came up from the chair, apparently fumbling in his pocket for the car keys; that he (Gilliard) went to turn and the gun fell from his shoulder; and that the butt end of it hit the counter, causing the gun to fire and the load to hit Mr. Chance in the chest.

John M. Allen, a forensic scientist with the Mississippi State Crime Lab, performed tests on the shotgun trying to make it fire accidentally. It was dropped and hit with a mallet, and Allen testified that the only way he could fire the gun was by applying three (3) to five (5) pounds of pressure on the trigger. Dr. Sergio Gonzalez, pathologist who performed an autopsy on Mr. Chance, stated that, in his opinion, based on the angle of the wound, the victim was in a sitting position at the time the shot hit him. A certified copy of a previous conviction was introduced into evidence, which indicated Gilliard pled guilty to another armed robbery and received a sentence of thirty (30) years prior to the present trial.

Gilliard called witnesses who testified that he was one of eleven children; that he dropped out of school around age fourteen (14) to assist in supporting the family; that he was faced with hardships in growing up; and that he had a drinking problem. A psychologist testified that Gilliard is below average intelligence, but is not retarded; that he needs a structured disciplined environment; that he is easily influenced; and that he should not be released from prison.

Seals testified for the State. He was permitted to plead guilty as an accessory before the fact to the crime of armed robbery and was sentenced to ten (10) years in the custody of the Mississippi Department of Corrections.

LAW

I.

Did the lower court err in overruling appellant's motion for a change of venue?

[1] Appellant filed a motion for change of venue because of alleged publicity through the news and television media given to the crime prior to the trial. The appellant did not comply with Mississippi Code Annotated § 99–15–35 (1972), which follows:

> On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, *supported by the affidavits of two or more credible persons*, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper. (Emphasis added)

Appellant's motion was supported only by his affidavit, and not affidavits of two or more credible persons. In *Gentry v. State*, 416 So.2d 650 (Miss.1982), a capital murder case, this Court held the requirement is essential to the validity of the motion. *See also Butler v. State*, 320 So.2d 786 (Miss. 1975); *Fabian v. State*, 267 So.2d 294 (Miss. 1972) and *Wilson v. State*, 234 So.2d 303 (Miss.1970).

[2] Even so, the court heard evidence on the motion from seven (7) witnesses, none of whom testified that appellant could not receive a fair trial in Jones County. Five of the witnesses testified that, in their opinions, appellant would receive a fair trial in the county. The trial judge reserved final decision until after voir dire examination of the jurors to determine from that examination whether or not a fair and unbiased jury could be obtained. He overruled the motion to change venue after considering the totality of the voir dire and being convinced that the jury was unbiased in the case.

We are of the opinion that the lower court did not abuse its discretion in denying the change of venue and that no error was committed. *Saucier v. State*, 328 So.2d 355 (Miss.1976); *Parks v. State*, 267 So.2d 302 (Miss.1972), *cert. den.* 411 U.S. 947, 93 S.Ct. 1923, 36 L.Ed.2d 408 (1972); *Anderson v. State*, 246 Miss. 821, 152 So.2d 702 (1963).

II.

[3] Did the lower court err in failing to quash the jury panel because of the State's use of its peremptory challenges to exclude all persons of the Negro race solely on the basis of race?

After the jury panel had been challenged for cause, twelve (12) jurors were tendered to the State, which exercised seven (7) peremptory challenges. A full panel was then tendered to the defense which exercised six (6) peremptory challenges. The State used one additional challenge for a total of eight (8) peremptory challenges. After completion of the panel, the appellant requested that the record reflect all persons peremptorily excused by the State were Negroes. Later, after selection of the alternate juror, and sequestration of the jury for the night, appellant filed a motion to quash the panel on that ground. The lower court overruled the motion and the appellant now asserts it was obvious those persons were excused from the jury solely on the basis of race in violation of the Sixth and Fourteenth Amendments in allowing systematic exclusion of Negroes from the jury.

In the capital murder case of *Gaines v. State*, 404 So.2d 557 (Miss.1981), the same question was presented to this Court. Relying upon *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Court held that exercise of such challenges did not constitute error. *See also Coleman v. State*, 378 So.2d 640 (Miss.1979).

III.

Did the lower court err in failing to excuse certain jurors for cause upon the request of appellant?

[4, 5] The appellant contends that several jurors on the voir dire examination indicated they were acquainted to some extent with the deceased, and that the lower court erred in failing to excuse them for cause. None of these persons actually served on the jury. Only one of them (L.M. Johnson) was discussed seriously in the brief and appellant exercised a peremptory challenge on him. As to the others, a full panel was accepted by appellant before it was necessary to call them as jurors. He exercised only six (6) peremptory challenges, and,

when the jury was accepted, appellant still had six (6) peremptory challenges which were not used. The trial court will not be put in error because of failure to permit a challenge for cause as long as peremptory challenges remain unused. *Rush v. State*, 278 So.2d 456 (Miss.1973); *Chapman v. Carlson*, 240 So.2d 263 (Miss.1970); *Capler v. City of Greenville*, 207 So.2d 339 (Miss. 1968), *cert. den.* 392 U.S. 941, 88 S.Ct. 2323, 20 L.Ed.2d 1403 (1968). Further, the lower court did not abuse its discretion in refusing to excuse those jurors for cause.

IV.

Did the lower court err in excusing certain jurors for cause at the request of the State?

[6] Appellant's argument concerns the eligibility of one Hillery Pugh. The following are Mr. Pugh's answers to the court's preliminary voir dire:

THE COURT: All right, Mr. Pugh, did you say you were related by blood or marriage to the defendant?

MR. PUGH: Yes, sir.

THE COURT: What is that relationship?

MR. PUGH: Second-cousin of my wife.

THE COURT: He is a second-cousin to your wife?

MR. PUGH: That's right.

THE COURT: All right, I will make no decision in this case for a moment, but I will ask you at this time if you are permitted to serve in this case can you disregard that kinship and try this case as though you were not related by blood or marriage to the defendant? Can you do that?

I will have to ask you, since we don't have the microphone, to speak up rather loudly.

MR. PUGH: I imagine I could, but I would rather not.

THE COURT: You would rather not serve?

MR. PUGH: That's right.

Later, the prosecution challenged Pugh for cause, which was sustained, as indicated below:

MR. SMITH: All right, sir. Number 32, Hillery Pugh, Jr., who testified that his wife is related to the defendant, and she is a second-cousin—or that the defendant is a second-cousin to his wife and that he had rather not serve as juror.

MR. PARRISH: I recall that he said he imagined he could but would rather not, and I agree he said his wife was a second-cousin.

THE COURT: Does second-cousin fall within that prohibited degree?

MR. SMITH: That's second-cousin by marriage.

THE COURT: By marriage.

MR. PARRISH: I don't know by marriage whether it does or not.

THE COURT: Does the defendant have any objection to that juror being excused for cause by the State?

MR. PARRISH: Yes, sir, we object to that.

THE COURT: The Court will sustain your request for that juror to be excused based both on his kinship by marriage and the doubt that he expressed as to whether he could disregard that kinship.

Mississippi Code Annotated § 13–5–79 (1972) provides the following:

> Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct. *Any juror shall be excluded, however, if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error.* (Emphasis added)

The reported cases support the literal interpretation of the statute that, if the court

be of the opinion a juror cannot try the case impartially, the juror may be excluded and such exclusion shall not be assignable as error. *Sullivan v. State*, 155 Miss. 629, 125 So. 115 (1929); *Smith v. State*, 103 Miss. 356, 60 So. 330 (1912). In *Sullivan*, a murder case, the Court stated that a litigant does not have a vested right to a particular juror but only a right to be tried by a fair and impartial jury. We are of the opinion that the lower court did not commit error in excluding juror Pugh.

V.

Did the lower court err in admitting evidence which had no relevance to the sentencing phase of the trial and was prejudicial and inflammatory?

Appellant contends that, under Mississippi Code Annotated § 99–19–101 (Supp. 1982), during the sentencing phase, the State's proof shall be limited to a showing of the eight (8) aggravating circumstances. *Coleman v. State*, 378 So.2d 640 (Miss.1979). He argues that, since appellant entered a plea of guilty to the crime, it was error to admit in evidence certain physical items and testimony because they were inflammatory and prejudicial. The State introduced evidence in an effort to show the following aggravating circumstances:

(1) The capital murder was committed while the defendant Robert C. Gilliard, Jr., was engaged in the commission of the crime or robbery.

(2) The defendant, Robert C. Gilliard, Jr., committed the capital murder for pecuniary gain.

(3) The defendant, Robert C. Gilliard, Jr., committed the capital murder in an especially heinous, atrocious, or cruel manner.

(4) The defendant, Robert C. Gilliard, Jr., was previously convicted of a felony offense involving the use or threat of violence to a person.

[7] Appellant complains of four (4) photographs showing certain physical evidence in the store. The first photograph shows a spent shotgun shell on the floor, and the second shows the open cash register. There is nothing inflammatory about those photographs, the appellant having admitted the robbery and homicide, and there could be some relevance to the second photograph in establishing robbery as a motive for pecuniary gain.

The third photograph shows the deceased's arm and the wadding from the shotgun shell lying near his hand, while the last photograph shows the body lying on the floor near a chair. A considerable amount of blood appears in both photographs. They have some relevance in establishing the cruelty and atrocity of the crime and in showing the position and distances connected with the discharge of the gun. Admission of similar photographs has been upheld. *Evans v. State*, 422 So.2d 737 (Miss. 1982); *Coleman v. State*, 378 So.2d 640 (Miss.1979); *Irving v. State*, 361 So.2d 1360 (Miss.1978).

[8] Appellant next complains about the admission in evidence of the shotgun used in the robbery, a scale drawing of the crime scene, which shows the layout of the store and the position of the body, a spent shotgun shell, the wadding, a vial containing shotgun pellets, and photographs of the street and exterior of the store taken from the point where the get-away car was parked. The witness John Allen performed test firings of the gun and determined that the spent shell only could have been fired from that shotgun, and that the wadding is of the type peculiar to the manufacturer of that brand of shells. They had some relevance and probative value in corroborating the witnesses. The photographs of the street and exterior of the store had probative value as to where the robbery took place and what the area appears to be. Those items of evidence were not inflammatory, nor were they prejudicial to the appellant.

Appellant finally attacks the testimony of several witnesses, who identified the physical evidence discussed above. The prosecution is entitled to present its case, even during the sentencing phase where a plea of guilty has been entered, in an orderly man-

ner. For that purpose, it is necessary to admit certain testimony and items of physical evidence so that the jury may have a clear and coherent idea of how and where the crime occurred. *Evans v. State, supra.*

VI.

Did the lower court err in permitting cross-examination of the appellant concerning his plea of guilty to capital murder?

[9] Appellant's brief addresses this assignment in only two (2) paragraphs. He argues that it was error for the lower court to permit cross-examination of the appellant about his plea of guilty and with reference to his confession concerning the robbery-murder. On direct examination, appellant testified that the gun went off by accident and he unintentionally killed Mr. Chance. The lower court sustained an objection to the testimony, but did not give any corrective instructions. On cross-examination, in an attempt to refute the appellant's claim that the homicide was not intentional, the district attorney cross-examined appellant concerning his guilty plea. For the same reason, he cross-examined appellant regarding his confession and how the homicide occurred. Appellant takes the position that the cross-examination was improper impeachment. However, each side was trying to show how the homicide occurred, which was not a collateral matter, and had relevance on the issue of whether or not the homicide was especially heinous, atrocious or cruel. We are of the opinion that the cross-examination was not improper impeachment and did not constitute reversible error.

VII.

Did the lower court err in failing to inform the jury of the deal in plea negotiations between the State and the accomplice Warren Seals?

[10] The record reflects that there is a dispute between appellant and the accomplice Warren Seals as to who was the moving force behind the robbery-murder, each accusing the other of being the instigator. In the cross-examination of Seals, he was asked whether or not the State promised him that he would not be indicted for capital murder, if he would cooperate in the trial. Seals answered in the negative, and stated that no promises were made to him. His testimony was contrary to the statement made by the district attorney in chambers in the presence of the trial judge and appellant's attorney. When the district attorney's statement was made, the following colloquy occurred between the trial judge and appellant's attorney:

> THE COURT: You have not indicated and do not now request that the Court indicate any ruling on this in any way?
>
> MR. PARRISH: Your Honor, I think—I don't think we have to do it now, but I have to consider and look into something on whether or not I need to ask the Court to instruct the jury about that. I don't know, and I may have to do that due to his testimony in order to preserve whatever he might be entitled to, but if I can look into that, I can inform you in the morning, and I presume we cannot do it this afternoon any way.

Later, during the conference on jury instructions, the appellant's attorney moved the court to inform the jury about the negotiations and the court overruled the motion with the words "in view of the manner in which the request is made." The court did indicate that it would consider an instruction, if properly submitted. (No instruction was submitted).

The appellant cites *King v. State*, 363 So.2d 269 (Miss.1978), a murder prosecution, where several persons had plotted together with the defendant to kill the defendant's husband. Prior to trial, one of the co-conspirators was granted immunity with the concurrence of the trial court and, during trial, that witness implicated the defendant. When specifically asked about it, the witness denied knowledge of any deal. The trial court was aware that the witness had been granted immunity, but throughout the proceedings denied the defense motion to require disclosure of this type of informa-

tion. The court overruled the motion on the ground that such facts were more properly subject to cross-examination. The jury deliberated with the belief that the prosecuting witness was still subject to prosecution when in fact he was under grant of immunity. This Court reversed the conviction.

King cited *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), where, during the trial, the star witness denied that any deal had been made and, during the appeal, the defense discovered the promise which had been made by the first prosecutor. The United States Supreme Court reversed the conviction because the witness's credibility was "an important issue in the case, and evidence of any understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know of it."

King and *Giglio* are distinguished from the present case in that Seals was not granted complete immunity, but was only told that the death penalty would not be sought against him. The prosecution subsequently recommended a sentence of ten (10) years. Furthermore, *King* and *Giglio* were cases involving adjudications of guilt while the case sub judice involves a sentencing hearing, where the appellant admitted his participation in the robbery-homicide, and had pled guilty to capital murder. Further, during closing argument, the district attorney expressly told the jury he had made an agreement with Seals in order to secure Gilliard's conviction and to show that Gilliard was the one who fired the gun.

Refusal to grant the instruction, which was not submitted by the appellant, is not reversible error. *See Newell v. State*, 308 So.2d 71 (Miss.1975).

VIII.

Did the lower court err in failing to declare a mistrial after the district attorney made certain prejudicial remarks in his closing argument, viz, that imposing a life sentence would only be ten (10) years, at which time the defendant would be eligible for parole?

[11] The appellant contends that remarks of the district attorney during closing argument were inflammatory, prejudicial, and constituted reversible error. The State counters with the argument that the appellant opened the matter in his closing argument and invited the response and argument made by the district attorney. Pertinent parts of both arguments follow:

BY MR. PARRISH:

I would like to mention one other thing to you at this point. Approximately two weeks prior to this he was convicted of another armed robbery here in town, and he plead guilty to that too, and he received a sentence of thirty years, and if you see fit to give him life, he will be serving thirty years, plus life.

* * * * * *

He doesn't need to be out, and the only thing that I can say is that Robert Gilliard ought to be in the state penitentiary. He is already going there for thirty years, and what you are to decide is whether or not he is going to get those thirty years, plus life, or, if at sometime before those thirty years, he is going to be executed.

* * * * * *

I don't believe he will ever be a danger to anyone again. I don't mean he wouldn't be a danger if we let him walk out on the street because he would probably start drinking again and fall in with other people like Warren Seals, but that's not where he is going, if you come back into the courtroom and inflict a sentence of life imprisonment. We can remove him from society without inflicting the death penalty in this case.

I am glad to know that in addition to a life sentence that he will have thirty years too, because he won't be around, and the only question is whether or not he ought to suffer death.

BY MR. SMITH (District Attorney):

Speaking of how long things go—about the penitentiary. I think—don't believe for a second that Mr. Parrish is telling

you that, "well, he will get life," and then I guess he is wanting you to believe that after he dies they are going to keep him up there thirty more years. It doesn't work like that about how long you are at the penitentiary, and he knows as well as I do, life is ten years and you are eligible then for parole.

Appellant objected to the argument of the district attorney as being improper and prejudicial. The lower court overruled the objection "in view of the argument made by the defense counsel."

In *Evans v. State, supra*, defense counsel compared the sentence of a codefendant with the death penalty sought for Evans in an attempt to show an unfairness by the disparity in the sentences. The prosecution responded in final argument saying that a light sentence "was only the jury sentence," implying that possible release or parole would be granted. The court declined to hold the remarks reversible error on the ground that they were provoked. *Smith v. State*, 220 So.2d 313 (Miss.1969), involved reversal of a murder conviction, because the prosecuting attorney said, "If found insane, he will be released when he recovers." *Gambrell v. State*, 238 Miss. 892, 120 So.2d 758 (1960), reversed a murder conviction when the jury was instructed that, if the defendant was found insane, he would be released upon recovery. In *Augustine v. State*, 201 Miss. 277, 28 So.2d 243 (1946), a reversal was entered where the prosecuting attorney made the following remarks in closing argument:

> The diligent district attorney, in his closing argument to the jury, said: "That he had seen or known of one man who had been tried for five different murders because the jurors followed the course of least resistance, and turned him loose on the others; that he had seen people go to the penitentiary for five or six year terms, then come out to commit other crimes, and that unless a stern verdict was rendered in this case it would not stop crime, and that people who were sent to the penitentiary were given a pardon or suspension." [201 Miss. at 286, 28 So.2d at 244].

The statement by the district attorney constituted error. Prosecuting attorneys often become overzealous in arguing capital cases, particularly when attorneys for the defendant attempt to overemphasize and exaggerate the real meaning of a life sentence in the penitentiary. Prosecuting attorneys should refrain from making prejudicial or erroneous remarks, even in response to argument of defense counsel. In the present case, the remarks of the appellant's attorney clearly and obviously were made for the purpose of leading the jury to think that, because of a thirty-year armed robbery sentence and with a life sentence in the present case, the appellant would spend the remainder of his life in the state penitentiary. Without question, those remarks amounted to provocation and caused the district attorney to respond as he did. Therefore, under the decisions of this Court, the error does not require reversal.

IX.

Did the lower court err in refusing jury Instructions D–2, D–4, D–6, D–7, D–9, D–10, D–11 and D–12?

Instruction D–2 follows:

> The Court instructs the jury that should you be unable to unanimously agree on a verdict the Court will sentence the Defendant to life imprisonment.

Yates v. State, 253 Miss. 424, 175 So.2d 617 (1965), cited by appellant, is not authority for his position that refusal of Instruction D–2 constitutes error. In *Yates*, the death penalty was imposed by the jury. The instruction simply set forth the form of a verdict telling the jury that it could return any one of three verdicts (1) determining the penalty of the defendant and fix his punishment at death, (2) fixing his punishment as life in the penitentiary, and (3) certifying that they are unable to agree upon his punishment, in which event it would be the court's duty to sentence him to life imprisonment. The instruction was granted and the case was affirmed.

[12] Instruction S–B told the jury that to inflict the death penalty the verdict must be unanimous. Instruction S–A told the jury that it must unanimously find beyond a reasonable doubt one or more of the aggravating circumstances existed in order to return the death penalty; that, if none of those elements were found to exist, the death penalty could not be imposed; and that the jury should return a verdict sentencing the appellant to life imprisonment. Instruction C–20 told the jury that it must unanimously find the aggravating circumstances outweighed the mitigating circumstances in order to return the death penalty. The instruction further told the jury that it must return one of three verdicts, to-wit: (1) verdict imposing the death penalty, (2) verdict sentencing appellant to life imprisonment, and (3) the jury was unable to unanimously agree on punishment.

Refusal of Instruction D–2 was not error.

Instruction D–4 follows:

> The Court instructs the jury that in considering mitigating circumstances you shall consider whether or not the Defendant would pose a danger to others or to society should he be sentenced to life imprisonment rather than death.

[13] While the jury may consider any circumstances that the jury may think to be mitigating, whether from one to one thousand, the court is not required to specifically point out and emphasize all possible mitigating circumstances. It is sufficient, if the court by instruction informs the jury it can consider any mitigating circumstance and then leave for the jury the determination of what may, or may not, be mitigating. The jury was adequately instructed in this area by Instruction C–20, telling it to consider

> (6) Any other matter, circumstance or combination of circumstances, or any other aspect of the defendant's character, life or record, and any other circumstance of the offense brought before you during the trial of this case which you, the jury, deem to be mitigating on behalf of the defendant.

Instructions D–6 and D–7 follow:

JURY INSTRUCTION NUMBER D–6

> The Court instructs the jury that if you find that the aggravating circumstances outweigh the mitigating circumstances in this case, you are sill not bound to sentence the Defendant to death, but may sentence him to life imprisonment.

JURY INSTRUCTION NUMBER D–7

> The Court instructs the jury that even if you should find that insufficient mitigating circumstances exist in this case to outweigh the aggravating circumstances, you are not required to impose the death penalty, but, you may sentence the Defendant to life imprisonment.

Again, Instruction C–20 told the jury that, before it could return the death penalty, it must unanimously find that the aggravating circumstances outweigh the mitigating circumstances and that it must unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances exist in order to return the death penalty. If none existed, the death penalty may not be imposed and the jury should return a sentence of life imprisonment. Also, Instruction D–8 (granted) told the jury that one who is guilty of capital murder does not automatically receive the death sentence, and that the jury could not inflict the death penalty unless it found that, beyond all reasonable doubt, the aggravating circumstances, if any, outweigh the mitigating circumstances, if any.

Appellant complains that the lower court erred in refusing Instruction D–9, which sought to include as an element of mitigation the fact that "appellant acted under the substantial domination of another person." What appellant seeks to specifically emphasize is generally covered in Instruction C–20 which listed the following as a possible mitigating factor:

> (4) Any favorable traits in the character of the accused, and any compensating or mitigating factors in his life history and behavior, and any factors which were

beyond the control of the defendant in his life history, rearing, and upbringing which may have caused him to be involved in this crime and which were beyond his influence or control.

Appellant assigns Instructions D–11 and D–12 as being erroneously refused. They follow:

D–11

The Court instructs the jury that if the defendant, Robert Claude Gilliard, Jr., is sentenced to life imprisonment he will be confined to maximum security.

JURY INSTRUCTION NUMBER D–12

The Court instructs the jury that even if you find that there are a larger number of aggravating circumstances, then you still may not return the death penalty if they are overcome by mitigating circumstances, even though there may not be as large a number of mitigating circumstances.

The appellant does not argue or brief that assignment. There was no error in refusing those instructions. No. D–11 was not relevant to the sentence, and Instruction C–20 and others granted adequately cover the sense of D–12.

X.

[14] Did the lower court err in granting Instruction C–20? The instruction included two aggravating factors: (1) that capital murder was committed while defendant ... was engaged in the commission of the crime of robbery, and (2) that the defendant ... committed the capital murder for pecuniary gain. Appellant contends that it was reversible error to include both factors, since they duplicate and because murder for pecuniary gain was intended to apply to hired killers. The case of *Smith v. State*, 419 So.2d 563 (Miss.1982), involved this very question, and held that the instruction was not error, citing *Voyles v. State*, 362 So.2d 1236 (Miss.1978) and *Bell v. State*, 360 So.2d 1206 (Miss.1978).

[15] Appellant also argues that the instruction was error because it listed as an aggravating circumstance that "the crime was committed in an especially heinous, atrocious or cruel manner." He relies upon decisions of the Florida Supreme Court which hold that the words "especially heinous, atrociously or cruel" must be construed to be something more than the normal taking of a human life, and that intentional acts involving torture to the victim or other cruelties are required to set the death penalty apart from normal capital felonies. Courts have held that such a sentencing guideline given to the jury must provide a meaningful basis for distinguishing the few cases in which capital punishment is imposed from the many cases in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.1982).

Under the facts of the case sub judice, we are of the opinion that the question of whether or not the murder was especially atrocious, heinous or cruel was properly submitted to the jury. *Evans v. State, supra.*

In *Dobbert v. Florida*, 375 So.2d 1069 (Fla.1979), *cert. den.* 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862, *reh. den.* 448 U.S. 916, 101 S.Ct. 37, 65 L.Ed.2d 1179 (1980), the Florida Supreme Court held that even though the lower court considered two circumstances which would not pass constitutional muster and did not amount to aggravating circumstances, there was one aggravating circumstance which existed and that it was sufficient to uphold the death penalty. The only distinction between *Dobbert* and the present case is that in *Dobbert*, under Florida law, the judge determined the sentence without a jury.

APPELLATE REVIEW OF SENTENCE

The appellant assigns as Error XI, that the lower court erred in refusing to impose a sentence of life imprisonment at the conclusion of all the evidence presented, or, in the alternative, that the lower court erred in failing to grant appellant's motion for vacation of the death penalty and imposition of a life sentence.

In accordance with Mississippi Code Annotated § 99–19–105(3)(a), (b), (c) and (5) (Supp.1982), and the decisions of this Court and the Federal courts on imposition of the death penalty, we have carefully reviewed the record in this case and have compared it and the death sentence imposed in the cases which have been decided by this Court since *Jackson v. State*, 337 So.2d 1242 (Miss.1976). Those cases consist of fifteen (15) decisions by this Court from *Bell v. State*, 360 So.2d 1206 (Miss.1978) to *King v. State*, 421 So.2d 1009 (Miss.1982).[1] In *Coleman v. State*, 378 So.2d 640 (Miss.1979), the case was reversed as to punishment and remanded for resentencing to life imprisonment.

[16] In our opinion, after such review and comparison, the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other and the death penalty will not be wantonly or freakishly imposed here.

[17] We also find and conclude that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor. The evidence in the case overwhelmingly support's the jury's finding of at least one statutory aggravating circumstance, viz: (1) the capital offense was committed by appellant while he was engaged in the commission of the crime of robbery; (2) the capital offense was committed for pecuniary gain; (3) the capital offense was committed in an especially heinous, atrocious, or cruel manner; and (4) the appellant was previously convicted of a felony offense involving the use or threat of violence to a person.

After comparison of the present case to those enumerated herein, we find that the sentence of death is not excessive or disproportionate to the penalty imposed in those cases, considering both the crime and the manner in which it was committed and the defendant. We also are of the opinion that the death penalty imposed on Gilliard is consisten and even-handed to like and similar cases and the sentencing phase followed in this trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not imposed.[2]

The judgment of the lower court is affirmed, and Wednesday, March 23, 1983, is set for the date of execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED. WEDNESDAY, MARCH 23, 1983, SET FOR EXECUTION OF THE DEATH PENALTY.

PATTERSON, C.J., WALKER and BROOM, P.JJ., and BOWLING, DAN M. LEE, and PRATHER, JJ., concur.

HAWKINS and ROBERTSON, JJ., took no part.

Martha Jean Brown BLAND

v.

STATE of Mississippi.

No. 52358.

Supreme Court of Mississippi.

March 2, 1983.

Rehearing Denied April 13, 1983.

Appeal from Circuit Court, Tallahatchie County; Andrew C. Baker and Dick R. Thomas, Judges.

Cleve McDowell, Drew, for appellant.

Bill Allain, Atty. Gen. by Walter L. Turner, Sp. Asst. Atty. Gen., Jackson, for appellee.

1. A list of the cases is attached as Appendix A to *King v. State*. Since *King*, *Evans v. State*, 422 So.2d 737 (Miss.1982) was decided November 3, 1982.

2. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

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NO. 82-6775

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT C. GILLIARD, JR.,
Petitioner

VS.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CATHERINE WALKER UNDERWOOD
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

and

BY: CHARLES W. MARIS, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

QUESTIONS PRESENTED

I. WHERE PETITIONER HAS FAILED TO FOLLOW THE RULES OF THIS COURT, IN THAT HIS AFFIDAVIT DOES NOT ACCOMPANY HIS MOTION TO PROCEED IN FORMA PAUPERIS, AND HIS STATEMENT OF MAILING IS NOT VALIDLY NOTARIZED, SHOULD THIS COURT CONSIDER HIS PETITION?

II. WHERE, IN THIS CAPITAL CASE, THE CONSTITUTIONALITY OF SUBMITTING TO THE JURY THE AGGRAVATING FACTORS THAT THE MURDER WAS COMMITTED 1) DURING THE COURSE OF A ROBBERY, AND 2) FOR PECUNIARY GAIN HAS NEVER BEEN PRESENTED TO THE LOWER COURT, CAN IT BE GROUND FOR REVIEW HERE?

III. WHERE, IN THIS CAPITAL CASE, THE CONSTITUTIONALITY OF THE SUBMISSION TO, AND AFFIRMATIVE FINDINGS BY, THE JURY, OF THE AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL HAS NEVER BEEN PRESENTED TO THE LOWER COURT, CAN IT BE GROUND FOR REVIEW HERE?

IV. WHERE A STEPHENS V. ZANT [631 F.2d 397 (5th Cir. 1980), cert. granted, 454 U.S. 814 (1981)] - TYPE ISSUE, CONCERNING DEFECTIVE AGGRAVATING FACTORS, WAS NOT RAISED IN THE LOWER COURT, CAN IT BE GROUND FOR REVIEW HERE?

V. WHERE PETITIONER HAS NEVER BEFORE MADE THE CLAIM THAT A HEARING SHOULD HAVE BEEN ALLOWED TO DETERMINE WHETHER OR NOT A PATTERN OF PRACTICE EXISTS WITH REGARD TO THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES, MAY HE NOW MAKE THAT CLAIM IN THIS COURT?

VI. WHERE PETITIONER'S CLAIM CONCERNING "AGENCY DOMINATION" PRESENTS NO FEDERAL ISSUES, AND WHERE THE CLAIM HAS NOT PREVIOUSLY BEEN RAISED, CAN IT BE GROUND FOR REVIEW HERE?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

82-6775

ROBERT C. GILLIARD, JR.
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Robert C. Gilliard, Jr. v. State of Mississippi, 428 So.2d 576 (Miss.1983). Rehearing was not requested. A copy of the opinion affirming conviction and sentence is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3), and poses five (5) questions for review.

STATEMENT OF THE CASE

Petitioner, Robert C. Gilliard, Jr., was indicted for the crime of capital murder by the Grand Jury of the Second Judicial District of Jones County, Mississippi, during the September, 1981 Term. The indictment emanated from the August 27, 1981 shotgun

slaying of Grady Chance during the commission of an armed robbery of Chance's business, the Best Chance Package Store in Laurel, Mississippi.

Gilliard was allowed to enter a plea of guilty, after being extensively examined by the trial judge, at which time he specifically admitted all of the charges as laid in the indictment.

A sentencing trial was held (pursuant to Section 99-19-101, Miss. Code Ann. (Supp.1982)), and Gilliard was sentenced to die in the gas chamber. The jury found the existence of the following aggravating factors:

1) the capital murder was comitted while Gilliard was engaged in the commission of the crime of robbery;

2) the capital murder was committed for pecuniary gain;

3) the capital murder was committed in an especially heinous, atrocious or cruel manner; and

4) Gilliard was previously convicted of a felony offense involving the use or threat of violence to a person.

On automatic appeal to the Mississippi Supreme Court, the judgment in the trial court was affirmed without dissent on February 16, 1983, and March 23, 1983 was set for execution of the death penalty. Gilliard v. State, 428 So.2d 576 (Miss.1983).

A stay of execution pending filing and disposition of this petition was granted by this Court on March 14, 1983.

The facts of the robbery-killing, as found by the Mississippi Supreme Court, are as follows:

> The evidence for the State shows that on August 27, 1981, Gilliard, age thirty-seven (37) years, lived with one Tessie Jones in Heidelberg, Mississippi. On that date, they attended a party and met Warren Seals and Edwin Darby. They were drinking intoxicating liquor and the group decided to rob some business in Laurel. They drove to two

establishments there, but several customers were in each place and they passed them up. Eventually, they drove to the Best Chance Package Store on Ellisville Boulevard, where Gilliard and Darby got out of the car, leaving Seals and Tressie Jones inside.

Gilliard was armed with a .25-caliber automatic pistol and Darby had a sawed-off shotgun. Gilliard exchanged the .25-automatic to Darby for the shotgun before leaving the automobile. They entered the store and saw the proprietor, Grady Chance, sitting in a chair facing the entrance to the store. Mrs. Wilma Chance, his wife, was sitting on a stool behind the counter and was talking on the telephone. Darby grabbed the telephone from her hand and jerked it off the wall. The robbers then ordered Mrs. Chance to open the cash register and give them the money, which she did. Mr. Chance told them, "We don't have much money here. We went to the bank." He remained sitting in the chair and Gilliard went behind the counter in search of more money. They took approximately two hundred dollars ($200.00) from the store.

Gilliard ordered the Chances to give him the keys to their automobile, planning to take the same and drive it to a different place where Seals would pick them up. Mrs. Chance testified that her husband was still sitting in the chair and was only about two feet away from Gilliard when he shot Mr. Chance in the chest, the load causing him to spin and fall to the floor. Gilliard and Darby then left and went around the back of the store. Seals started the car, left the scene and was unable to find them. Mrs. Chance went to a nearby restaurant for help, where a nurse had heard the noise and went to the store. She found Mr. Chance lying in a pool of blood with no pulse or breathing. She attempted to resuscitate him without success. Detective Jonathan Hare of the Laurel Police Department received a call about the robbery around 8:15 p.m. and immediately went to the scene (other officers had already arrived). He photographed the body and the store and collected items of physical evidence, consisting of a spent shotgun shell and wadding.

428 So.2d at 577-78.

REASONS FOR DENYING THE WRIT

I. Petitioner Has Failed To Comply With The Rules Of This Court

A.

Rule 46(1), Rules of the Supreme Court of the United States, provides in part as follows:

> A party desiring to proceed in this Court in forma pauperis shall file a motion for leave so to proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4. . ., setting forth with particularity facts showing that he comes within the statutory requirements.

In the case at bar, no affidavit from petitioner accompanies his motion to proceed in forma pauperis. Rather, the motion is accompanied by an affidavit[1/] from petitioner's counsel, stating that an affidavit from petitioner "will be forwarded to the Court immediately upon receipt." The rule does not provide for such a procedure. Moreover, as of June 15, 1983, the Clerk of this Court has not received petitioner's affidavit. Rule 46 further states, "the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules. . . ." Therefore, the petition in this case should never have even been filed.

B.

Rule 28(2), Rules of the Supreme Court of the United States, provides that a document is deemed timely filed if it is deposited in the United States mail, first class postage prepaid, properly addressed to the Clerk of this Court, within the time allowed for filing, with the additional provision that

> there is filed with the Clerk a notarized statement by a member of this Court, setting forth the details of the mailing, and stating that to his knowledge the mailing took place on a particular date within the permitted time.

1/ Which is defective in the same respect as petitioner's statement of mailing. See I(B), infra.

In the case at bar, petitioner's statement of mailing contains an invalid notarization[2/] which renders the entire statement invalid. Consequently, the petition for writ of certiorari cannot be deemed to have been timely filed under Rule 28.

The failure to comply with the Rules of this Court, without more, is ground for the dismissal of the petition.

II. Petitioner Did Not Raise A Constitutional Issue In The Lower Court With Regard To Duplicate Or Cumulative Instructions On Aggravating Factors, And May Not Raise That Ground For the First Time Before This Court.

III. Petitioner Did Not Raise As An Issue In The Lower Court The Constitutionality Of The Trial Court's Submission To The Jury, And The Jury's Affirmative Finding, Of the Aggravating Factor That The Capital Murder Was Especially Heinous, Atrocious, Or Cruel; Consequently, He May Not Now Raise That Issue In This Court.

In his petition for writ of certiorari, petitioner, for the first time, raises issues which question the constitutionality of three statutory aggravating circumstances as they were applied in his case. Specifically, he contends that the following two aggravating circumstances "form a constitutionally infirm two-part series of defective cumulative and duplicate instructions" (petition, p. i):

> The capital murder was committed while the defendant, Robert C. Gilliard, Jr., was engaged in the commission of the crime of robbery.
>
> The defendant, Robert C. Gilliard, Jr., committed the capital murder for pecuniary gain.[3/]

2/ The statement was notarized on May 17, 1983, while the notary's stamp reveals that her commission expired on March 30, 1983.

3/ These two factors are set out as aggravating circumstances in Section 99-19-101(5)(d) and (f), Miss. Code Ann. (Supp. 1982), and were submitted to the jury in Instruction C.20. (R. V, 803-06)

In addition, petitioner contends that the submission and affirmative finding of the following aggravating factor were constitutionally defective. (petition, p. 10):

> The defendant, Robert C. Gilliard, Jr., committed the capital murder in an especially heinous, atrocious, or cruel manner.[4/]

We readily concede that on direct appeal petitioner raised before the lower court certain issues concerning the foregoing three aggravating factors. The issues then raised, however, were not couched in federal constitutional terms. As is apparent from his brief on direct appeal (a copy of which is appended hereto as Appendix A), petitioner attached no federal constitutional significance whatsoever to his piror complaints concerning the aggravating factors.

It is well-settled that, under the rationale of Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), and Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969), this Court lacks jurisdiction to decide an issue that has not been presented to the state courts, or has not been presented to those courts in a federal constitutional context. This rule mandates absolute bar of petitioner's first two claims before this Court.

IV. Petitioner Did Not Raise A Stephens v. Zant[5/] - Type Issue In The Lower Court, And May Not Raise One For The First Time Before This Court.

Petitioner concedes that the third issue he urges to this Court was not raised below, but contends that it "is necessarily implicated by the paucity of the Mississippi Supreme Court's

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4/ This factor is set out as an aggravating circumstance in Section 99-19-101(5)(h), Miss. Code Ann. (Supp.1982), and was submitted to the jury in Instruction C.20. (R. V., 803-06).

5/ Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981); question certified to Georgia Supreme Court, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982); question answered by Georgia Supreme Court, 250 Ga. 97, 297 S.E.2d 1 (1982).

reasoning in discussion of aggravating factor discussion." (petition, pp. 8-9) Under the principles of Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L.Ed.2d 392 (1981), and Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 (1969), this Court lacks jurisdiction to decide this issue.

Moreover, for purposes of discussion only, we also submit that the case at bar simply does not involve a Stephens v. Zant - type situation. Stephens involved the situation where one of the aggravating factors found by the jury was subsequently declared unconstitutional. Thus, the issue was whether or not the death sentence could stand on the remaining aggravating factors. In utter contrast, the case at bar involves no invalidation of an aggravating factor. Rather, the lower court here, at least by implication, upheld the validity of the aggravating factors, as well as the jury's determination of their applicability to the case at bar. Accordingly, petitioner's contention that this case is afflicted with a Stephens v. Zant - type problem is clearly untenable.

V. Petitioner Never Requested in The Trial Court That A Hearing Be Held To Determine Whether Or Not A Pattern Of Practice Exists With Regard To the Prosecutor's Use Of Peremptory Challenges; Nor Was Such A Claim Presented On Direct Appeal; Therefore Petitioner May Not Now Claim That He Was Not Afforded Such A Hearing.

At his trial, petitioner moved to quash the jury panel on the ground that all of the peremptory challenges used by the prosecutor were used to exclude black veniremen.[6/] (R. III, 446) The motion was overruled, and that ruling was assigned as error on

6/ We take issue with petitioner's statement that the black veniremen who were peremptorily challenged by the prosecutor "were the only blacks eligible in the venire for the eventual panel. . . ." (petition, p. 5) The falsity of that statement is evidenced by the fact that the alternate juror was a black man. (R. V, 784)

direct appeal to the Mississippi Supreme Court. That court, citing Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965), affirmed the trial court's ruling.

In his petition to this Court petitioner states as follows:

> Here the defense sought to pursue the jury exclusion issue further before the trial court, but the judge, far from allowing a hearing to determine whether a pattern of exclusion existed in other criminal trial, foreclosed the inquiry entirely.
>
> (petition, p. 14)

Simply put, the statement is not true. The record reflects that, at petitioner's request, the prosecutor was made to take the stand and testify as to the reasons behind his use of peremptory challenges. When questioning of the prosecutor was completed, petitioner's counsel stated, "That's all I have by way of evidence on this motion and we move to quash the jury panel." (R. III, 468). Petitioner's pursuit of the jury exclusion issue is thus revealed to have ended by his own choice, not by the trial judge's foreclosure.

At no time did petitioner present to the trial court or to the Mississippi Supreme Court the issue he seeks to present to this Court, i.e., whether or not he was entitled to a hearing to explore past prosecutorial practices with regard to the use of peremptory challenges. Consequently, this Court lacks jurisdiction to entertain that issue. Webb v. Webb , 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

VI. Petitioner's Claim Concerning "Agency Domination" Presents No Federal Issue, Nor Was It Raised Below; It Is Therefore Barred From Consideration by This Court.

Petitioner claims that he should "have been allowed at trial to develop further material on 'agency' domination of [his] will... and to proceed to an offer of proof and/or a hearing. . . ."

(petition, p. ii) He has failed, however, to isolate or voice any constitutional ramifications of the claimed error. Thus, the claim remains purely a matter of state law, beyond this Court's jurisdiction to review.

Furthermore, petitioner's current desire for a hearing on "agency domination" was never made known to the trial court or to the Mississippi Supreme Court.[7/] Therefore the claim is barred. Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

CONCLUSION

For the reasons stated the petition for writ of certiorari should be denied.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL

Catherine Walker Underwood

BY: CATHERINE WALKER UNDERWOOD
ASSISTANT ATTORNEY GENERAL

and

Charles W. Maris Jr.

BY: CHARLES W. MARIS, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

7/ The record does not bear out petitioner's claim that "[f]urther inquiry of Seels [sic] was cut off by the State's objections sustained by the trial court." petition, p. 6. (R. IV, 592-612)

CERTIFICATE OF SERVICE

I, Charles W. Maris, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the above and foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to Honorable David M. Corwin, 140 Henry Street, Brooklyn, New York 11201.

This, the 16th day of June, A.D., 1983.

Charles W. Maris Jr

SPECIAL ASSISTANT ATTORNEY GENERAL

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT C. GILLIARD — APPELLANT

VS. — NO. 53,959

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

J. Ronald Parrish,
Public Defender
P.O. Box 1126
Laurel, Mississippi

Attorney for Appellant

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PROPOSITION SIX: The Court erred in alowing the State to cross-examine the Defendant concerning his entry of a plea of quilty to the crime of capitol murder. 6,7

HOLDEN V. STATE, 85 So. 2d 208, 226 Miss. 726 (1956) 7

PROPOSITION SEVEN: The Court erred in failing to inform the jury as to the "Deal"and Plea negotiations between the State and the Defendant's accomplice, Warren L. Seals, III, and especially in view of the fact that the record discloses that Seals committed perjury in his testimony concerning his knowledge of these matters. 7,8,9

KING V. STATE, 363 So. 2nd 269 (Miss. 1978) 9

PROPOSITION EIGHT: The Court erred in failing to grant a mistrial on account of certain statements made by the County Attorney and District Attorney in their closing arguments, specifically, the fact that the District Attorney in his closing argument stated words to the effect that a life sentence is the same as ten years and then the Defendant would be eligible for parole, and because of the cumulative and prejudicial and inflammatory effect of the closing argument of the State's Attorney's. 9,10,11,12,13

GAMBRELL V. STATE, 120 So. 2d 758 (Miss. 1960) 12

HARTFIELD V. STATE, 189 So. 2d 530 (Miss. 1939) 12

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PROPOSITION NINE: The Court erred in refusing Defendant's instructions number D-2, D-4, D-6, D-7, D-10, D-12, D-11, and D-9. 13,14,15

COLEMAN V. STATE, 378 So. 2d 640 (Miss. 1979) 14

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PROPOSITION TEN: The Court erred in granting the Court's Instruction C-20, State's S-A, as amended. 15,16,17

RILEY V. STATE, 366 So. 2d 19, (Fla. 1979) 16

SPINKELLINK V. WAINWRIGHT, 578 F. 2d 582 (5th Cir. 1978) 17

PROPOSITION ELEVEN: The Court erred in refusing to impose a sentence of life imprisonment at the conclusion of all the evidence offered by the State and at the conclusion of the Defendant's evidence, or in the alternative the the Court erred in failing to grant Defendant's post-trial motion for vacation of the death sentence and imposition of a life sentence by the Court. 17

CONCLUSION 18

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT C. GILLIARD, JR.	APPELLANT
VS.	NO. 53,959
STATE OF MISSISSIPPI	APPELLEE

BRIEF STATEMENT OF THE CASE

The Appellant, ROBERT C. GILLIARD, JR., was indicted by the September Grand Jury for the Second Judicial District of Jones County, Mississippi, for the capital murder of Mr. Grady Chance, when Mr. Chance was killed during the course of an armed robbery at his liquor store in Laurel, Mississippi. The Appellant entered a plea of guilty to the charge laid in the indictment, and after a trial solely, on what punishment was to be imposed, the jury returned a verdict of death.

BRIEF OF APPELLANT

ARGUMENT AND APPLICABLE LAW

PROPOSITION ONE : The Court erred in overruling the Defendant's Motion for a Change of Venue.

The Appellant filed a Motion for a Change of Venue. As can be seen from a reading of the testimony of the witnesses called in support thereof, it was necessary to hold the Appellant in a city some miles away due to threats on his life; the local television station ran an editorial stating that nationally known convicted murderer should have never gotten life but should have gotten the death penalty; the local news paper ran the armed robbery and murder as a headline story on several occasions; the Defendant had been shown on several occasions on the local television station

being lead to the Courthouse in handcuffs; and liquor stores in the City of Laurel were thereafter ordered to close two hours earlier than in the past. (A 1-4) (R20-76), (A 4-7)(R201-276) (R298-408)

Considering the testimony of the witnesses in this case, especially when taken in conjunction with the Voir Dire of the jury, Appellant repsectfully submits that the Court was in error in failing to grant his Motion for a Change of Venue. Certainly, great care and caution should be taken and deference given to the Motion for a Change of Venue in a case where the death penalty may be imposed. When one looks at the testimony of the witnesses on the Motion and the number of people on Voir Dire who were acquainted with the deceased or his family, who were well known and respected members of the community, one is left with the unmistakable impression that the Motion should have been granted.

ANDERSON V. STATE 92 Miss. 656, 46 So. 65 (1908)

EDDINS V. STATE 110 Miss. 780, 70 So. 898 (1916)

BOND V. STATE 128 Miss. 792, 91 So. 461 (1922)

PROPOSITION TWO: The Court erred in failing to Quash the jury panel which actually rendered the death sentence in this case because of the State's admitted use of it's premptary challenges to excuse all persons of the negro race from the panel solely on the basis of their race. (A 9)(R435-446) (R461-468)

All challenges made by the State of Mississippi in exercising it's premptary challenges were on persons of the negro race, the same race as that of the Defendant. This resulted in an all white panel rendering the death sentence in this case. The Defendant called the District Attorney as a witness and questioned him concerning his reasons for his exercise of the premptary challenges and in support of the Defendant's contention that race was the only motive for their exercise. In the District

Attorney's testimony he was able to think of some reasons for excusing two or three jurors,but testifiedthat he did not remember why he excused the others. The Defendant, and Appellant here,respectfully submits that it is obvious from the testimony given that jurors were excused from this panel solely on the basis of race. While it may be conceded that premptary challenges are those which may be without cause, it is respectfully submitted to this Court that when the Defendant is a member of a minority race, race should not be allowed to be the sole motivating factor for the exercise of premptary challenges so as to result in denying the Defendant in a case from having a jury judge him which represents a fair cross-section of the community. (A 8)(R435-446) (R461-468)

Section 13-5-2 of the Mississippi Code of 1972, annotated as amended, provides as follows:

> "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status."

Clearly, citizens of this State were excluded from serving on the actual jury in this case on account of race. If this state's statutory provisions are such as to allow prosecution to systematically exclude negro's from serving on jury panels soley because of race, then this statutory scheme is unconstitutional and violates the criminal defendant's right to an impartial jury under the sixth and fourteenth amendments of the Constitution of the United States of America.

TAYLOR V. LOUISIANA 419 US 522, 42 L. ED 2d 690, 95 S Ct 692

PROPOSITION THREE: The Court erred in failing to excuse certain jurors for cause at the request of the Defendant.

The Defendant sought to excuse eight jurors from the jury panel for cause, which motion to excuse for cause was denied

by the Court. Juror Latrell Marion Johnson had known Mr. Chance and his family for about 30 years. (A 5)(R-350)(R-421) Juror Mildred L. Holifield knew Mr. Chance and his wife and had bowled with Mrs. Chance for about two years. (A 5) (R363-366) (R425) Juror Royal Gunnels knew Mr. Chance and his wife and had been to their place of business. He had a business and personal relationship with them and stated that he was pretty sure that he could go by the law and evidence. (R369-372)(R-428) Juror Mary Frances Mozingo knew Mr. Chance's daughter and worked with her on school projects for the past five years. (A 5)(R374-376)(R-429) Juror Sidney Phillips had known Mr. Chance for about 30 years and went deer hunting with him, in addition to buying whiskey at his store. (A 6)(R376-378)(R429-430) Juror Herbert Parker knew Mr. Chance and knew him when he was in the service station business, he stated that about half the people in Laurel knew Mr. Chance. (A 6)(R378-380)(R-430) Juror Charlotte J. Hammonds knew the Chance family and had lived in the same neighborhood with them about eighteen years. His grandson was in the school where she worked. (A 6)(R380-381)(R430-431) Juror Stancil McNeil had a speaking acquaintance with Mr. Chance when he ran a gas station and did business with him. (A 6)(R386-387) (R-432) Juror Osmond S. Mathews had met Mr. Chance at a wheel alignment shop when he was having his car worked on. (A 7)(R-388) (R-426)

Although all of these jurors stated that their relationship with Mr. Chance and their knowledge of him and his family would not influence them in any way, Appellant maintains that this is totally unbelievable. Here we have a man on trial for capital murder, and respectfully submit that great leeway should be taken in granting the Defendant's challenges in order to insure that a fair and impartial jury with no preconceived notion is

impaneled. It is difficult to imagine that the Defendant in this case received such a jury, when the record reflects so many people who were acquainted with the deceased. The Mississippi Constitution of 1890, Section 26, guarantees the Defendant in each criminal case the right to a trial by a fair and impartial jury. Appellant respectfully submits that the failure of the Court to excuse these jurors for cause, denied this Defendant that right under our Constitution.

PROPOSITION FOUR: The Court erred in excusing certain jurors for cause at the request of the State.

The Court excused Hillary Pugh for cause at the State's request and over the objection of Defense counsel. The Defendant was Pugh's wife's second cousin, and he stated he believed he could serve and go by the law and the evidence, but would rather not. (A 7)(R307-308)(R417-418) This juror was not related to the Defendant in any degree that would prohibit from serving on the jury, and he further stated that he could follow the law and the evidence. He simply expressed a preference for not serving on the jury panel. The Appellant respectfully sumbits that it was error of the Court to allow the State to excuse this juror for cause, especially so in view of the fact of him being of the same race as the Defendant. The effect of allowing this juror to be improperly excused for cause was to allow the State of Mississippi, in essence a thirteenth premptary challenge to which it was not entitled. Mississippi Code of 1972, anotated, as amended, Section 99-17-3. Additional, this further inhanced the ability of the State to insure that there would be no black members of the panel which rendered a decision in this case.

PROPOSITION FIVE: The Court erred in permitting the State to introduce into evidence certain evidence which had no relevance or probative value in the sentencing phase of this trial, said evidence being highly prejudicial and inflammatory in nature.

Over persistant objection of Defense counsel, the State was allowed to introduce a drawing of the scene of the crime, pictures of the scene of the crime together with the body of the deceased, shotgun pellets, wadding, and shell casings, pictures showing where the accomplice, Warren L. Seals, III, parked his car, and numerous witnesses were allowed to testify as to the condition of the body at the scene of the crime and what they found when they arrived. Other witnesses were allowed to testify concerning shotgun and conversations and statements they had with the Defendant. These witnesses included John M. Allen, Wanda Gayle Shoemake, Jonathon Hare, and Paul Little. (A 9-14)(R478-551) The Defense counsel objected to all of these matters on the grounds that the Defendant had already plead guilty to the crime of capital murder and that these matters could have no bearing on determining what sentence could be imposed and were merely prejudicial and inflammatory. Section 99-19-101 of the Mississippi Code of 1972, annotated, as amended, provides that if the Defendant has pleaded guilty:

> "Evidence may be presented as to any matter that the Court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances."

None of the testimony above complained of could possibly have any relevance at the sentencing phase of a trial of a Defendant who has already entered a plea of guilty to the charge laid in the indictment. This introduction was a clear violation of the provisions of the Code section above quoted, and Appellant respectfully submits that the allowing of the introduction of this evidence was reversible error.

PROPOSITION SIX: The Court erred in allowing the State to cross-examine the Defendant concerning his entry of a plea of guilty to the crime of capitol murder.

During the testimony of the Defendant, he was not allowed to testify that the murder committed during an armed robbery was an unintentional act by him. The State was further allowed to extensively cross-examine him as to the entry of his guilty plea. (A 17-18) (R644-649)

There was no dispute as to the guilt of the Defendant, and the purpose in illiciting this type of testimony was to prejudice the jury, and in effect to attempt to impeach the Defendant on a collateral matter. This Court is held that it is not permissible to impeach a witness on a collateral matter.

HOLDEN V. STATE, 85 So. 2d 208, 226 Miss. 726 (1956)

PROPOSITION SEVEN: The Court erred in failing to inform the jury as to the "Deal" and Plea negotiations between the State and the Defendant's accomplice, Warren L. Seals, III, and especially in view of the fact that the record discloses that Seals committed perjury in his testimony concerning his knowledge of these matters.

Warren S. Seals, III, called as a witness by the State of Mississippi. His testimony was to the effect that the master-mind of the armed robbery of the Chance Package Store was the Defendant, ROBERT C. GILLIARD, JR., and that the whole thing had been GILLIARD'S idea. He further testified that he was not indicted for capital murder and was the driver of the get-away-car. He stated that he first decided to start talking with the District Attorney after he talked to his lawyer and was not promised anything for his cooperation and that no promises of any kind had been made to him. (A 14-15)(R582-612)

Subsequent to the testimony of Seals, Defense counsel requested for the record that the District Attorney reveal any information that he had communicated to the witness Seals or to Seals' attorney concerning Seals' indictment for armed robbery, and about any communication about what would be done concerning Seals' participation in the murder which occurred during the

armed robbery. The District Attorney in the form of a Stipulation for the record stated that he first had contact with Warren Seals on September 6, 1981, at the Laurel Police Department and testified that he told Seals that if he would cooperate truthfully with the State, that the State would not seek the death penalty against him, so long as he was not the individual who fired the fatal shot. Thereafter Seals gave the statement implicating the Defendant GILLIARD. On the recommendation of the District Attorney, the Grand Jury returned an indictment against Seals as an accessory before the fact to the crime of armed robbery. The District Attorney testified that he had talked with Seals' attorney and informed him that if his client would testify truthfully for the State that he would recommend, on a plea of guilty, that he be sentenced to serve a term of ten years in the State Penitentiary. Seals' attorney indicated to the District Attorney that he was willing to except this and that while he would not specifically inform his client as to what the State's recommendation would be, he would inform his client of the negotiations and that the recommendation would be a sentence in the State Penitentiary. (A 19-20)(R674-679)

As can be seen from the above the witness Seals clearly committed perjury in his testimony as to regards to the time when he first talked to the District Attorney, as to his knowledge of plea negotiations and the "Deal", and as to whether he had been promised anything in exchange for his testimony. In spite of this the Court refused request of Defense counsel that the jury be informed as to the negotiations and arrangements between Seals and the State of Mississippi. (R-703)(R-735) (R769-770)(R843-845)(A 27-30)

This Court has held that where the Defense repeatedly request disclosure of all concessions or allowances made by Prosecution to an alledged co-conspirator of Defendant and where on cross-examination the co-conspirator denied making a "Deal" with the Prosecution in exchange for testimony against the Defendant, and were further the trial Court knew of the grant of immunity to the co-conspirator in exchange for testimony when it denied Defendant's repeated request for such disclosure, even though the co-conspirator claimed his attorney had not informed him of the deal, the trial Court reversibly erred in allowing the jury to believe that the co-conspirator had not been granted any type of deal or immunity.

KING V. STATE 363 So. 2d 269 (Miss. 1978)

In King, supra, this Court also stated that the knowledge of the co-conspirator's attorney must be imputed to him. In the case at bar, the grant of immunity was promised directly to the co-conspirator and other aspects of the "Deal" were communicated to his attorney. There is a direct conflict between the testimony of the Defendant and Seals as to who was the instigator and master-mind of this armed robbery and killing. The jury was effectively denied the right to know that the co-conspirator, Seals had lied and committed perjury in his testimony at a time when the co-conspirator, Seals was seeking to blame the entire affair on the Defendant, GILLIARD, who ultimately received the penalty of death, while Seals was given a sentence of ten years.

PROPOSITION EIGHT: The Court erred in failing to grant a mistrial on account of certain statements made by the County Attorney and District Attorney in their closing arguments, specifically, the fact that the District Attorney in his closing argument stated words to the effect that a life sentence is the same as ten years and then the Defendant would be eligible for parole, and because of the cumulative and prejudicial and inflammatory effect of the closing argument of the State's Attorney's.

In his closing argument, the County Attorney, Mr. Walters, stated to the jury, "I submit to you that it is time for a jury as yourselves to get rid of people like Gilliard and send a message to any of those who would commit an armed robbery and murder in Jones County". The Defense counsel duly objected to this and moved for a mistrial, which motion was overruled by the Court. This Court has repeatedly stated that State's Attorneys are not to engage in personal abuse or vilification of a Defendant or appeal to passion or prejudice. Further, emotional appeals and melodramatic actions are to be eschewed and the State's Attorney's should confine themselves to the facts and evidence and inferences which the facts can reasonably support.

STEWART V. STATE, 263 So. 2d 754, (Miss. 1972)

PIERCE V. STATE, 289 So. 2d 901, (Miss. 1974)(A 26-27)(R747-755)

In the closing argument made by the District Attorney, Mr. Smith, one of the most prejudicial and serious errors of the trial occurred when the following transpired, to-wit:

MR. SMITH:

Speaking of how long things go-- about the penitentiary. I think-- don't believe for a second that Mr. Parrish is telling you that, "well, he will get life," and then I guess he is wanting you to believe that after he dies they are going to keep him up there thirty more years. It doesn't work like that about how long you are at the penitentiary, and he knows as well as I do, life is ten years and you are eligible then for parole.

MR. PARRISH:

We object, your Honor, and move for a mistrial.

MR. SMITH:

He brought it up about the rest of his life there, Judge.

MR. PARRISH:

We object and ask that the jury be instructed to disregard that statement by Mr. Smith. That's ---

MR. SMITH:

-- he brought it up.

MR. PARRISH:

-- improper argument.

THE COURT:

Overruled, in view of the argument made by defense counsel.

MR. SMITH:

He knows that.

MR. PARRISH:

We ask for a mistrial, your Honor.

THE COURT:

Overruled.

MR. SMITH:

And I know that. And so I ---

MR. PARRISH:

-- we ask for a bill of exceptions to this --

MR. SMITH:

-- a record is being made and he doesn't need it, Judge.

THE COURT:

All right, you may present your bill of exceptions. (A 29-30)(R767-770)

This line of argument clearly and unmistakably tended to induce a death sentence from this jury. There was absolutely no evidence or testimony in the record to support such an argument.

In WINDHAM V. STATE, 45 So. 861 (Miss. 1908), this Court held that it was reversible error to tell the jury in a murder trial the range of punishment that might be imposed for manslaughter, as this tended to induce a conviction of manslaughter.

In HARTFIELD V. STATE, 189 So. 2d 530(Miss.1939), this Court held that it was reversible error for the State's attorney to argue to the jury that since the Defendant was serving a life sentence he would not be getting any punishment unless they imposed the death penalty.

In GAMBRELL V. STATE, 120 So. 2d 758 (Miss. 1960), This Court held it was reversible error to instruct the jury that if they returned a verdict of insanity the Defendant would be confined to an insane asylum and would be freed when he was restored to his sanity, the Court pointing out that this instruction was probably partly responsible for the conviction in that case.

In. SMITH V. STATE, 200 So. 2d 313 (Miss. 1969), this Court held it to be reversible error for the prosecutor to tell the jury that if they found the Defendant insane and let him go to an asylum, he would be released upon the public when the asylum should announce him restored to sanity.

In all of these cases and others, this Court had clearly indicated that it is no business of the State of Mississippi in it's closing argument to the jury to comment upon such matters as when a person who is insane may be released or when one may

be eligible for parole. Additionally, there are absolutely no facts and evidence to substantiate or support this type of argument, and the Appellant respectfully submits that it had an overwhelming affect in inducing the jury in this case to return a verdict of death.

PROPOSITION NINE: The Court erred in refusing Defendant's instructions number D-2, D-4, D-6, D-7, D-10, D-12, D-11, and D-9.

The Defendant's jury instruction D-2 requested that the Court instruct the jury that should they be unable to unanimously agree on a verdict the Court would sentence the Defendant to life imprisonment. (R-812) (A 22)

In YATES V. STATE, 175 So. 2d 617, (Miss. 1965), this Court upheld the giving of such an instruction and stated that it was proper. This instruction was refused by the Court, and Appellant respectfully suggest that this refusal was erred, in that in it's absence the jury could have, and probably was, lead to believe that unless they returned a verdict in this case that the Defendant would have to be retried or would be set free.

In instruction D-4 the Defendant requested that the Court instruct the jury that in considering mitigating circumstances that they should consider whether or not the Defendant would pose a danger to others or to society should he be sentenced to life imprisonment rather than death. (A 22) (R-814)

Dr. Brad Fisher, a psychologist and an expert in the study of prisoners and prisoners on death row, testified that from the test given in his consultation with the Defendant that were he incarcerated in prison for the remainder of his life he would not pose a danger to others or to society. (A 20-21)(R717-731) Our death penalty statute requires that the jury be instructed as to any item that can be reasonably relevant as to whether or not

the Defendant should suffer death or life imprisonment.

In COLEMAN V. STATE, 378 So. 2d 640 (Miss. 1979), this Court committed itself to the individualized consideration of mitigating circumstances. The Appellant respectfully submits that this was a relevant mitigating circumstances, appropriate for consideration and the Court's refusal of this instruction was reversible error.

Instruction number D-6 and D-7 are substantially the same. They requested that the Court instruct the jury that even that if the mitigating circumstances did not outway the aggravating circumstances that they were not required to impose the death penalty but could nevertheless sentence the Defendant to life imprisonment. (A 22) (R816-817) There is nothing in Section 99-19-101 of the Mississippi Code of 1972, anotated, as amended, which provides that the jury must impose the death penalty in all events when the aggravating circumstances outway the mitigating circumstances. The matter is still optional with the jury, and indeed, any other arrangement would violate of the Constitution of the State of Mississippi and of the United States of America.

Jury instruction number D-10 requested that the Court instruct the jury that Warren L. Seals was an accomplice to the crime of capitol murder and under the law could receive death or life imprisonment, but that the State of Mississippi had chosen not to indict him for capitol murder and that they could take this into consideration in viewing his testimony and also in deciding whether ROBERT C. GILLIARD, JR., should be sentenced to death or life imprisonment. (A 22-23) (R-818) The Court granted an instruction which sufficiently cautioned the jury concerning Seals testimony; however, it was relevant for the jury to consider the punishment of

Seals in determining whether the Defendant, GILLIARD, should be sentenced to death or life imprisonment. Under the particular facts in this case the disparity in the sentences of the participants in this crime is so great as to be in abuse of prosecutorial discretion and so varying to be unconscionable. SULBERSON V. STATE, 379 So. 2d 499 (Miss. 1979)(See dissenting opinion)

In Instruction D-9 it was requested, among other things, that there be listed as a mitigating circumstance the fact that the Defendant acted under the substantial domination of another person. (A 23)(R820-822) The testimony of Patricia Ann McCullum (A 16-17)(R633-643), ROBERT C. GILLIARD, JR.,(A 17-18)(R644-669) and Dr. Brad Fisher (A 20-21)(R717-731) reported the giving of this item as an element of mitigation. As stated by this Court in Coleman, supra, mitigating circumstances should be considered on an individualized basis, and the Appellant respectfully suggest there is ample evidence for the jury to have believed that the Defendant so acting and they should have been given a specific opportunity to consider this as an item of mitigation.

PROPOSITION TEN: The Court erred in granting the Court's Instruction C-20, State's S-A, as amended.

This instruction, which was submitted to the jury, informed the jury to consider among other things, the following elements of aggravation:

(1) The capitol murder was committed while the Defendant, ROBERT C. GILLIARD, JR., was engaged in the commission of the crime of robbery.

(2) The Defendant, ROBERT C. GILLIARD, JR., committed the capitol murder for pecuniary gain.

(3) The Defendant, ROBERT C. GILLIARD, JR., committed the capital murder in an especially heinous, atrocious, or cruel manner. (A 24) (R803-805)

The Appellant contends that is was reversible error for the Court to list both the fact that the capital murder was committed

while the Defendant was engaged in the commission of the crime of robbery and that the Defendant committed the capitol murder for pecuniary gain. The Appellant contends that these two should be only one aggravating circumstance, and that it is error for the Court to give them both in the same instruction in that they are duplicative. It also appears that it was the legislative intention to provide that the pecuniary gain aggravating circumstances applied to murder for hire. RILEY V. STATE, 366 So. 2d 19, (Fla. 1979) Every robbery would have necessity have to be committed for pecuniary gain. To allow the State to list both of these items as aggravating circumstances, we contend is reversible error and in the case of robbery both should not be given.

Instruction C-20, State's S-A, as amended, further instructed the jury to consider as an aggravating circumstance that the capitol murder was committed in an especially heinous, atrocious, or cruel manner. (A 24)(R803-806) Certainly, it can be said that any and all murders are especially heinous, atrocious, and cruel because of the unjustifiable taking of a human life. However in the context to the capital murder statute, these words must be construed or considered to mean something more than just the taking of a human life. In RILEY V. STATE, 366 So. 2d 19, (Fla. 1979), the victim died from a gunshot wound in the course of a robbery. One of the aggravating circumstances found was that the murder was committed in "a terribly cruel, ruthless, and heinous manner". The Florida Supreme Court held that this aggravating circumstance must be limited to those capital felonies which are accompanied by such additional acts as to set the crime apart from the normal capital felonies, that is the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

SPINKELLINK V. WAINWRIGHT, 578 F. 2d 582 (5th Cir. 1978) The Appellant respectfully submits that it was reversible error for this item to be listed as an aggravating circumstance in that there is no evidence in the record to substantiate the same in the sense that the words are used under the capital murder statute.

PROPOSITION ELEVEN: The Court erred in refusing to impose a sentence of life imprisonment at the conclusion of all the evidence offered by the State and at the conclusion of the Defendant's evidence, or in the alternative the Court erred in failing to grant Defendant's post-trial motion for vacation of the death sentence and imposition of a life sentence by the Court.

As stated by this Court in BOYINGTON V. STATE, 389 So. 2d 485, (Miss. 1980), it is required to review the death penalty in capitol murder cases so as to make sure that the death penalty is not wantonly or freakishly imposed and it will compare the sentence with other cases of a similar nature. When the entire record is read and considered in this case, the death penalty is disproportionate and it's imposition would be to impose it in a wantonly or freakishly manner. This case is in some respects very simular to that of COLEMAN V. STATE, 378 So. 2d 640 (Miss. 1979), in which this Court reversed a sentence of death and imposed one of life imprisonment after it compared COLEMAN case with others and found that the penalty was disproportionate. When one considers the similarities of this case to COLEMAN and the minor punishment of the accomplice Seals, this case at Bar falls within this rule, and we respectfully represent that this Court, considering this and all the other errors, should reverse this case for the imposition of a sentence of life imprisonment.

CONCLUSION

The Appellant respectfully submits that each error, and all errors cumulatively, require that this case either be reversed for a new trial or that this Court remand the same for a sentence of life imprisonment after vacating the penalty of death.

Respectfully submitted,

ROBERT C. GILLIARD, JR.

BY: J. Ronald Parrish
HIS ATTORNEY

J. RONALD PARRISH

Public Defender
P.O. Box 1126
Laurel, Mississippi 39440

Attorney for Appellant

CERTIFICATE

I, J. Ronald Parrish, Attorney for Appellant, ROBERT C. GILLIARD, JR., do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the Honorable Bill Allain, Attorney General for the State of Mississippi, P. O. Box 220, Jackson, Mississippi.

This the 4th day of August, 1982.

J. Ronald Parrish

J. RONALD PARRISH

J. Ronald Parrish
Attorney at Law
P. O. Box 1126
Laurel, MS 39440

Attorney for Appellant